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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-5340.

HARRY H. and THELMA GIBBS, LEE S. JOHNSON, JR., RONALD McCALL, CLARK DODSON, and MARTIN MURRAY, on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

v.

FRANK GARVER, Individually and as Director of the Bureau of Motor Vehicles of the Commonwealth of Pennsylvania,

GENERAL MOTORS ACCEPTANCE CORPORATION, AUTO-ROAD, INC., AMERICAN MUTUAL SERVICES CORPORATION, GIRARD TRUST BANK, CHRYSLER CREDIT CORPORATION, PROVIDENT NATIONAL BANK, JOHN B. WHITE FORD, INC., PUBLIC ACCEPTANCE CORPORATION, and FORD MOTOR CREDIT COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION FOR RESPONDENTS GIRARD TRUST BANK AND PROVIDENT NATIONAL BANK.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-5340.

HARRY H. AND THELMA GIBBS, LEE S. JOHNSON, JR., RONALD McCALL, CLARK DODSON, AND MARTIN MURRAY, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

FRANK GARVER, INDIVIDUALLY AND AS DIRECTOR OF THE BUREAU OF MOTOR VEHICLES OF THE COMMONWEALTH OF PENNSYLVANIA,

GENERAL MOTORS ACCEPTANCE CORPORATION, AUTO-ROAD, INC., AMERICAN MUTUAL SERVICES CORPORATION, GIRARD TRUST BANK, CHRYSLER CREDIT CORPORATION, PROVIDENT NATIONAL BANK, JOHN B. WHITE FORD, INC., PUBLIC ACCEPTANCE CORPORATION, AND FORD MOTOR CREDIT COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENTS GIRARD TRUST BANK AND PROVIDENT NATIONAL BANK.

QUESTION PRESENTED.

The only question which would be brought to this Court by the grant of a writ of certiorari is the following issue of federal subject-matter jurisdiction:

> Whether a secured creditor's peaceable repossession of collateral upon a debtor's default, in accordance with an agreement of the parties and without any participation by a public agency or official, is private conduct which does not constitute state action within the meaning of the Civil Rights Act, 42 U. S. C. § 1983?

STATEMENT OF THE CASE.

The essential facts of record are accurately summarized in the opinion of the Court of Appeals, as follows:

> "Each of the named appellees [Petitioners in this Court] financed the purchase of an automobile either through an installment sale contract or a loan agreement which required periodic payments over a specified period of time. Each named appellee had created a security interest in his automobile as collateral security for the indebtedness. The agreements provided that, in the event of default by an appellee, the creditor would have the right to retake the automobile, with or without judicial process—a practice commonly referred to as self-help repossession." (Pet. App. A, 4a)

ARGUMENT.

I. The Six Courts of Appeals Which Have Considered the Question Presented Have Uniformly and Correctly Decided That Peaceable Repossession Pursuant to Contract Rights Does Not Constitute State Action.

The six Courts of Appeals which have reviewed the question presented in this case have all held that private, peaceable repossession of collateral upon a debtor's default, pursuant to an agreement between the parties and without state participation, is not state action so that there is no federal subject-matter jurisdiction of suits challenging such private conduct on the basis of the Civil Rights Act, 42 U. S. C. § 1983. In addition to the decision below, the other cases are:

Adams v. Southern California First National Bank, 492 F. 2d 324 (9th Cir. 1973), *petition for cert. filed*, 42 U. S. L. W. 3693 (U. S. June 7, 1974) (No. 73-1842, 1973 Term);

Nowlin v. Professional Auto Sales, Inc., 496 F. 2d 16 (8th Cir. 1974), *petition for cert. filed*, 42 U. S. L. W. 3703 (U. S. June 19, 1974) (No. 73-1897, 1973 Term); and its companion case *Mayhugh v. Bill Allen Chevrolet Co.*, 496 F. 2d 16 (8th Cir. 1974);

Nichols v. Tower Grove Bank and Trust Company, 497 F. 2d 404 (8th Cir. 1974);

Turner v. Impala Motors, — F. 2d —, 43 U. S. L. W. 2131 (6th Cir., September 20, 1974);

James v. Pinnix, 495 F. 2d 206 (5th Cir. 1974);

Brantley v. Union Bank & Trust Company, 498 F. 2d 365 (5th Cir. 1974), *petition for cert. filed*, 43 U. S. L. W. 3215 (U. S. October 8, 1974) (No. 74-393, 1974 Term);

Shirley v. State National Bank of Connecticut, 493 F. 2d 739 (2d Cir. 1974), *petition for cert. filed* (U. S. August 6, 1974) (No. 74-5091, 1974 Term).

These federal appellate decisions have correctly and uniformly interpreted and applied to the question presented the reasoning of the prior decisions of this Court in *Fuentes v. Shevin*, 407 U. S. 67 (1972), *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163 (1972), *Adickes v. S. H. Kress & Co.*, 398 U. S. 144 (1970), *Reitman v. Mulkey*, 387 U. S. 369 (1967) and *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961).

In addition to the decisions of six Courts of Appeals with respect to the question presented, the Courts of Appeals for the First and Seventh Circuits, *Fletcher v. Rhode Island Hospital National Bank*, 496 F. 2d 927 (1st Cir. 1974) involving bank set-off and *Phillips v. Money*, — F. 2d — No. 72-1772 (7th Cir., September 13, 1974) involving a garageman's lien, have held that the private exercise of those creditor's remedies does not constitute state action. In their decisions, these Courts adopted the reasoning of the decisions of the Courts of Appeals in the repossession cases.

Petitioners cite two federal district court decisions, *Boland v. Essex County Bank & Trust*, 361 F. Supp. 917 (D. Mass. 1973) and *Watson v. Branch County Bank*, — F. Supp. —, 43 U. S. L. W. 2099 (W. D. Mich., August 12, 1974) (Petition at p. 10) in an effort to show a lack of

unanimity among the federal courts with respect to the question presented. However, those decisions can no longer be considered authoritative even in those districts, in view of the recent and subsequent decisions of the Courts of Appeals for the First and Seventh Circuits, *Fletcher v. Rhode Island Hospital National Bank,* 496 F. 2d 927 (1st Cir. 1974) and *Phillips v. Money,* — F. 2d —, No. 72-1772 (7th Cir., September 13, 1974).[1]

II. The Decision of the Court of Appeals in This Case Is Consistent With Prior Decisions of This Court and Is Clearly Correct.

The Court of Appeals in this case correctly applied prior decisions of this Court to the question presented. The fourteenth amendment limits only actions of the states and not private persons, and the "under color of state law" requirement of the Civil Rights Act, 42 U. S. C. § 1983, is the same as the "state action" requirement of the fourteenth amendment (Pet. App. A, 6a). *Adickes v. S. H. Kress & Co.,* 398 U. S. 144, 152, n. 7 (1970); *United States v. Price,* 383 U. S. 787, 794-95, n. 7 (1966).

The Court of Appeals stated (Pet. App. A, 6a), and the record in this case shows, that peaceable, nonjudicial repossession involves no court procedure or official action. A holder of a security interest who repossesses a motor vehicle covered by the contract which created the security interest acts privately and without the aid, assistance or participation of any state official or agency. No one acting

1. The reported decisions of state appellate courts have also decided the federal question presented by this case in conformity with the above-cited decisions of the Courts of Appeals for the Second, Third, Fifth, Sixth, Eighth and Ninth Circuits. *John Deere Co. of Kansas City v. Catalano,* — P. 2d — No. 26328 (Colo. Sup. Ct., September 3, 1974); *Brown v. United States National Bank of Oregon,* 509 P. 2d 442 (Ore. Sup. Ct. 1973); *Northside Motors of Florida, Inc. v. Brinkley,* 282 So. 2d 617 (Fla. Sup. Ct. 1973).

on behalf of the state takes possession of the motor vehicle and the state has no other role in that action. The basis on which a creditor effects a peaceable, nonjudicial repossession upon default by a debtor is a specific provision of an installment sale or loan agreement. Neither the inclusion of such a provision in an agreement nor a creditor's decision to act on it is the result of any state compulsion. A creditor who repossesses acts for himself, at his own risk of liability if he should make an error or commit a breach of the peace or otherwise act unlawfully.

The peaceable repossession of the collateral is neither compelled nor prohibited by the Uniform Commercial Code or the Pennsylvania Motor Vehicle Sales Finance Act.[2] Those statutes are not the source of the creditor's remedy which has been based on contract since long before the statutes existed. The statutes simply have no prohibition against what private parties have agreed upon, but impose some limitations on the exercise of the contractual right (Pet. App. A, 7a-9a). MVSFA, 69 Pa. Stat. § 633; UCC, 12A Pa. Stat. § 9-503.

Under both statutes, "self-help repossession remains a private remedy enforced by purely private conduct pursuant to an agreement made privately and not under state compulsion. Thus, the state plays no significant role." (Pet. App. A, 7a). Accordingly, the Court of Appeals concluded that the State of Pennsylvania has not "*significantly* involved itself" in the private conduct complained of and that that conduct does not constitute "state action" (Pet. App. A, 7a). *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 173 (1972).

Nor did the Court find any evidence whatsoever of a "symbiotic relationship" between the state and private

2. The Pennsylvania Motor Vehicle Sales Finance Act, 69 Pa. Stat. §§ 601, 623, *et seq.* ("MVSFA") and the Uniform Commercial Code, 12A Pa. Stat. §§ 9-503 and 9-504 ("UCC").

creditors. *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 723-725 (1961); *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 174-175.

Similarly, the Court of Appeals, in its analysis of the Pennsylvania statutes, found no evidence "of encouragement and fosterage of the alleged unconstitutional act as in *Reitman v. Mulkey*, 387 U. S. 369 (1967)" (Pet. App. A, 7a). It distinguished the "situation in *Reitman*" from private, peaceable repossession as "vastly dissimilar".

> "Appellees concede that the self-help remedy of repossession 'existed in some form in the common law from a very early time.' Unlike *Reitman* then, the State of Pennsylvania has not by the enactment of the MVSFA permitted a practice which was formerly prohibited." (Pet. App. A, 7a-8a)

Finding nothing in this case even closely analogous to the *Reitman* situation, the Court of Appeals said:

> "We think that *Reitman* and *Moose Lodge, supra,* read together, suggest that absent direct state action, private repossessions are not infused with the quality of 'state action' unless we can conclude that the involvement of the State of Pennsylvania (through its enactment of the MVSFA) has 'significantly' encouraged or fostered self-help repossessions. *Reitman, supra,* 370 U. S. at 380; *Moose Lodge, supra,* 407 U. S. at 173. *See Burton, supra,* 365 U. S. at 722. We cannot so conclude." (Pet. App. A, 8a)

The Court of Appeals rejected Petitioners' contention that private repossessions are "infused with 'state action' merely because a state issues a certificate of ownership to the secured party enabling it to transfer the automobile to a third party purchaser at a sale following repossession"

(Pet. App. A, 11a). Petitioners' contention that "passage of title . . . transfers legal ownership of a motor vehicle from the consumer" (Petition at p. 16) is simply not in accord with Pennsylvania law. *Semple v. State Farm Mutual Auto Insurance Company*, 215 F. Supp. 645, 647 (E. D. Pa. 1963); *Braham & Co. v. Steinard-Hannon Motor Co.*, 97 Pa. Superior Ct. 19, 25 (1929).[3]

Petitioners are also incorrect in their assertion that the MVSFA changed the Pennsylvania common law to give the creditor a right to sue for a deficiency after repossession. The Court of Appeals for the Third Circuit has previously confirmed that the common law of Pennsylvania permits a creditor to enforce deficiency claims because the rights themselves are not conflicting. *In Re Adrian Research and Chemical Co.*, 269 F. 2d 734, 736-738 (3d Cir. 1959). Mere statutory recognition of the existence of common law contract rights does not constitute state action under this Court's precedents. In any event, a court proceeding on a deficiency claim which a creditor may or may not pursue after a repossession has no bearing on the question whether the prior repossession constitutes state action.

As the Court of Appeals held (Pet. App. A, 11a-13a), Petitioners' contention that, by passage of the UCC and MVSFA, the State of Pennsylvania somehow "delegated" a traditional state function to Respondents is without merit.

> "Probably the chief obstacle to concluding that self-help repossession involves a traditional state function is the fact, recognized by the district court and the appellees, that in one form or another the common law very early recognized repossession as a private remedy." (Pet. App. A, 12a)

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3. *See, Majors v. Majors*, 349 Pa. 334 (1944); *Weigelt v. Factors Credit Corp.*, 174 Pa. Superior Ct. 400 (1953); *Quaker State Finance Corp. v. Ankle*, 28 Leh. L. J. 417 (1960).

See, Adams v. Southern California First National Bank, 492 F. 2d 324, 337 (9th Cir. 1973). *See* also, *James v. Pinnix,* 495 F. 2d 206, 207-208 (5th Cir. 1974) in which that Court found private repossession to involve no delegation of a state function and distinguished its decision in *Hall v. Garson,* 430 F. 2d 430 (5th Cir. 1970), a decision relied upon by Petitioners in the Court below and in this Court. (Petition at p. 11)

In summary, there is nothing in the precedents to support the claim of Petitioners here. Nor is there any reason of policy suggested to justify the extension of the Civil Rights Act which Petitioners seek. They want the Act construed in a way that would bar any action of creditors to enforce civil obligations outside the judicial process. This case is not limited to "consumers" as Petitioners suggest and any principle upon which Petitioners could prevail could not be limited merely to repossession or to motor vehicles. Attack is made on key provisions of the Uniform Commercial Code which covers most secured transactions in all states except one. The essence of that attack is that the Code is constitutionally deficient in failing to prohibit any creditor action outside the judicial process. It would, if successful, preclude private parties from voluntarily entering into commercial transactions on the same basis which has become deeply rooted in American contract law and business life.

In the field of automobile financing for individuals, no good reason is suggested for an extension of constitutional restrictions on private contracts. On the one hand, the restriction of creditors' actions to judicial proceedings would not add anything of practical and recognizable substance to debtors' rights. Judicial proceedings are now available to debtors to correct, undo and even to punish wrongful actions of creditors. A debtor who does not want

a creditor to have the right to take private action on default, rightly or wrongly, can refrain from entering a contract that provides any such default right. The real objective of this case is to free debtors from having to make that choice which in many cases would be an admittedly hard one. The alternative, however, has potential consequences equally unpleasant. Denial to creditors of the right to enter contracts permitting peaceable, nonjudicial repossession can be expected, as established by the record below, to make such changes in the practices of credit suppliers as to actually reduce the choices of those who seek automobile financing.

The adjustment of such interacting interests of creditors and debtors is peculiarly appropriate for legislative resolution. No precedent of this Court requires a constitutional interpretation in this case that would delimit the range of contractual agreements that state laws may permit or regulate as determined through the legislative process. All the Courts of Appeals that have faced the question here have so concluded and there is no need or proper occasion for this Court to reconsider their conclusions.

CONCLUSION.

For the foregoing reasons, Respondents respectfully submit that the Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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